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No. 06-1697

In the Supreme Court of the United States

EDWARD GREEN JAMESON,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Kentucky Supreme Court correctly held that the county government's prohibition on nude conduct in sexually oriented businesses serves a substantial government interest under *United States v. O'Brien*, 391 U.S. 367 (1968), and its progeny.

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COUNTERSTATEMENT OF THE FACTS

In 1991, this Court upheld, over an adult business's challenge, an Indiana statute prohibiting public nudity. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). The Court held that nude dancing is expressive conduct only "marginally" within the "outer perimeters" of the First Amendment, and that Indiana's statute prohibiting that conduct is constitutional because it serves a substantial government interest in preventing the negative secondary effects associated with nude dancing. *Id.* at 566 (plurality); *id.* at 582 (Souter, J., concurring in judgment). In 2000, the Court upheld a similar local law, noting that the interests in "combating the harmful secondary effects associated with nude dancing are undeniably important." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000).

Four weeks after the Court's decision in *City of Erie*, the McCracken County Fiscal Court (the County's legislative body) published Ordinance No. 2000-4, "An Ordinance Providing Regulation of Sexually Oriented Businesses and Their Employees." App. 95-111. Section VII(b) of the Ordinance, App. 110, like the regulations at issue in *Barnes* and *City of Erie*, requires the *de minimis* covering of "pasties" and a "G-string," *see* App. 103-04 (defining "nudity"), but differs from those regulations in one important respect: it is more narrowly tailored because it applies only to sexually oriented businesses, the category of establishments associated with secondary effects. *Barnes*, 501 U.S. at 584 n.2 (Souter, J., concurring in judgment) (counseling that nudity prohibition should

be limited to "the context of *Renton*-type adult entertainment").

The preamble to the McCracken County Ordinance recognizes the negative secondary effects associated with sexually oriented businesses, and the Ordinance eschews any regulation of the content of speech. App. 96 ("The provisions of this ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials."). Rather, the law's purpose is to regulate sexually oriented businesses "in order to promote the health, safety, and general welfare of the citizens of the County, and to establish reasonable and uniform regulations relating to sexually oriented businesses." App. 96.

In adopting the Ordinance, the Fiscal Court relied on extensive legislative evidence documenting the adverse secondary effects of sexually oriented businesses, including reports from: (1) Phoenix, Arizona; (2) Minneapolis, Minnesota; (3) Houston, Texas; (4) Indianapolis, Indiana; (5) Amarillo, Texas; (6) Garden Grove, California; (7) Los Angeles, California; (8) Whittier, California; (9) Austin, Texas; (10) Seattle, Washington; (11) Oklahoma City, Oklahoma; (12) Cleveland, Ohio; (13) Beaumont, Texas; and (14) The Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses (State of Minnesota, June 6, 1989). App. 97.

Moreover, the Fiscal Court relied on the "findings incorporated in the cases of *City of Renton v. Play*

Time Theaters, Inc., 475 U.S. 41 (1986), *Young v. American Mini Theaters*, 426 U.S. 50 (1976), and *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991)." App. 97. In other words, just as the city council in the *Erie* case had done, the McCracken County Fiscal Court "expressly relied on *Barnes* and its discussion of secondary effects, including its reference to *Renton* and *American Mini Theatres*." *City of Erie*, 529 U.S. at 297. Such reliance was specifically countenanced in *City of Erie*:

> Because the nude dancing at Kandyland is of the same character as the adult entertainment at issue in *Renton*, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976), and *California v. LaRue*, 409 U.S. 109, 34 L. Ed. 2d 342, 93 S. Ct. 390 (1972), it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects. And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. at 51-52 (indicating that reliance on a judicial opinion that describes the evidentiary basis is sufficient).

Id. at 296-297.

Based on this Court's decisions and relevant secondary effects information, the Fiscal Court adopted 16 individual findings which focus on one

category of secondary effects: illicit sexual behavior on the premises of sexually oriented businesses. App. 97-99. This problem is well-documented in the relevant cases. *See, e.g., Barnes*, 501 U.S. at 584 (citing *United States v. Marren*, 890 F.2d 924, 926 (7th Cir. 1989) ("Michael's Magic Touch served alcoholic beverages and entertained its patrons with nude female dancers who, when not performing on stage, solicited the club's patrons to engage in sexual activities in rooms located above the club"), and *United States v. Doerr*, 886 F.2d 944, 949 (7th Cir. 1989) ("The clubs were nude dancing establishments that served no food or alcoholic beverages. The testimony at trial revealed that the prostitution activities at the clubs were conducted pursuant to the following general procedure . . . .")).

COUNTERSTATEMENT OF PROCEEDINGS BELOW

Shortly after the passage of the Ordinance, Edward Green Jameson received a criminal citation for operating his adult cabaret (Regina's II) in violation of several provisions of the Ordinance. In addition to violating the hours of operation requirement, Jameson allowed total nudity by the dancers and physical contact between nude dancers and customers. App. 3.

Jameson filed a motion in McCracken District Court to declare the Ordinance unconstitutional. An evidentiary hearing was conducted on October 18, 2001. App. 3. While several individuals testified on behalf of Jameson, *none* of the testimony attempted to explain how the pasties and G-string requirement would not be "in furtherance of" the Fiscal Court's interest in preventing the illicit sexual behavior

identified in the Ordinance's findings. App. 5. *See City of Erie*, 529 U.S. at 301 (upholding "pasties and G-string" requirement as narrowly tailored).

The first witness was Brent Stringer, a 911 dispatcher who testified as a lay witness. He discussed only the raw number of calls for police service from certain addresses. App. 3-4. Mr. Stringer noted that 911 had received numerous calls from Regina's II, comprising approximately two and one-half pages from that location, during the calendar year 2001 to that date. App. 3. Thus, Mr. Stringer confirmed that numerous calls for police service had been made from the sexually oriented businesses, albeit fewer than from two large non-adult nightclubs nearby. App. 3. Mr. Stringer did not testify as to the number of patrons, size, or occupancy limits of any establishment. App. 4. Significantly, Mr. Stringer testified that not all criminal investigations are reported on the 911 call log; *e.g.*, the log excludes undercover investigations. App. 50.

The next two witnesses were Melissa Meyer, day shift manager at The Playhouse, and Joanne Warner, owner of The Playhouse and other adult businesses in Colorado, Illinois and Tennessee. Ms. Meyer discussed the "rules" in effect at The Playhouse in order to keep the business and its employees safe. In particular, she noted the rules against drugs, acts "of any sexual nature," prostitution, and requiring that "everything is sanitized." Notwithstanding the violations involved in this case, Ms. Meyer testified that patron-dancer touching was prohibited. Ms. Warner then testified about the establishment's specific rules for dancers, including that "the clients be told we do not condone

any type of sexual masturbation." She also testified that she had called the police to report a man engaging in indecent exposure on the premises. App. 4.

George Wiley, a realtor, gave lay opinion testimony that the value of real estate on the "south side of Paducah" had "increased tremendously" over the past ten to fifteen years based on "what it's selling for now" and "the fact that it wasn't selling" fifteen years before. However, Mr. Wiley admitted that much of the increase in "south side" real estate in general was due to the recent presence of Wal-Mart in the area. App. 5.

On May 31, 2002, the McCracken District Court denied Jameson's motion to declare the Ordinance unconstitutional. App. 5. Applying this Court's decision in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the court concluded that McCracken County was entitled to rely upon the studies it compiled concerning the negative secondary effects of sexually oriented businesses. App. 6.

On April 9, 2003, the McCracken Circuit Court affirmed. Following *Renton*, the court held that the County need not "conduct new studies or produce evidence independent of that already generated by other municipalities to demonstrate the problem of secondary effects," but need only rely on evidence reasonably believed to be relevant to the problem. App. 6.

Jameson appealed. On August 6, 2004, the Kentucky Court of Appeals affirmed in part, vacated in part, and remanded the case for further proceedings.

App. 6. The court stated that "as between totally nude exotic dancing and exotic dancing that is accompanied by pasties and G-strings, we hold that any muting of the erotic message that occurs by prohibiting the totally nude exotic dancing is *de minimis*." Notwithstanding the *de minimis* nature of the regulation, and despite this Court's on-point decisions in *Barnes* and *City of Erie*, the panel reversed the lower courts' findings that the pasties and G-string regulation is constitutional. App. 7.

Citing *City of Los Angeles v. Alameda Books,* 535 U.S. 425 (2002), the Court of Appeals held that the witness testimony tended to cast direct doubt on the Fiscal Court's justification for the Ordinance. The Court of Appeals did not explain how the witness testimony demonstrated the Fiscal Court's reliance on relevant decisions, detailed legislative findings, and numerous secondary effects studies to be unreasonable. Nor did the Court of Appeals explain how the witness testimony undermined, in any way, the County's rationale that regulating nude conduct will prevent illicit sexual behavior in sexually oriented businesses. The Court of Appeals nevertheless shifted the burden back to the legislative body and remanded the case for an evidentiary hearing, requiring the county to proffer additional evidence indicating that the Ordinance's "ban on totally nude dancing furthers a substantial government interest *in McCracken County* without unreasonably limiting alternative avenues of communication." App. 8.

The Commonwealth filed a petition for discretionary review in the Kentucky Supreme Court, which was granted. From the outset, the Kentucky

Supreme Court identified the sole issue in the case as whether the Court of Appeals erred as a matter of law in concluding that Jameson provided evidence sufficient to cast direct doubt on the Ordinance's rationale to shift the evidentiary burden back to the legislative body. App. 8. The court then reviewed the history and development of First Amendment jurisprudence as it relates to sexually oriented businesses from *United States v. O'Brien*, 391 U.S. 367 (1968), through *Alameda Books*, 535 U.S. 425 (2002). App. 9-36.

After thoroughly and accurately discerning all the correct governing principles from this Court's jurisprudence, the Kentucky Supreme Court held that the Court of Appeals entirely "failed to articulate how Jameson's evidence successfully cast 'direct doubt' on McCracken County's evidentiary findings, which were based in part on the findings of the various courts in *Renton*, *Young*, and *Barnes*, as well as the County's findings that illicit sexual behavior occurs in sexually oriented businesses." App. 43. Specifically, the Court of Appeals erred by holding that Jameson shifted the burden back to the County by allegedly "demonstrating a lack of secondary effects *in McCracken County*." App. 46. "Not only does *Alameda Books* not support such a conclusion, but the requirement of a finding of local secondary effects essentially changes substantive law regarding the secondary effects evidence necessary to further a substantial government interest. Thus, the Court of Appeals erred in so ruling." App. 46; *see also id.* at 48 (emphasizing "*Renton*'s core principle that local governments are not required to conduct their own studies in order to justify an ordinance designed to

combat the secondary effects of adult businesses. Indeed, requiring a city to conduct its own studies would require that these conditions already exist, obviating the need for any form of burden shifting analysis").

Consistent with this Court's precedents, the Kentucky Supreme Court held that the Ordinance "satisfies the second prong of *O'Brien* in that the ordinance furthers the county's substantial governmental interest in preventing and combating the negative secondary effects associated with sexually oriented businesses." App. 53. Accordingly, the Kentucky Supreme Court reversed the Court of Appeals and reinstated the prior holding of the district court regarding the constitutionality of the Ordinance. App. 54.

REASONS FOR DENYING THE WRIT

A petition for a writ of certiorari will be granted only for compelling reasons, such as when (1) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals, or (2) a state court has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. A petition is rarely granted when the asserted error consists of the misapplication of a properly stated rule. *See* United States Supreme Court Rule 10.

Jameson's petition fails to establish any compelling reason to grant the writ. Indeed, Jameson fails to identify *any* misstatement of law in the decision below. He argues, instead, that the Court's plurality decisions have engendered confusion in the lower courts—without disclosing that those courts unanimously agree on what constitutes the holding of each of this Court's decisions and that the lower courts are quite consistent in the results that they reach. Contrary to Jameson's suggestion, the opinion below does not conflict with governing Eleventh Circuit precedent because that court's most recent ruling on the topic harmonizes its earlier rulings with those of this Court and the other courts of appeal. Finally, while Jameson alleges circuit splits on other topics within the area of regulation of sexually oriented businesses, neither the facts nor opinion in this case give rise to those questions or present a proper vehicle for this Court to address them. For all these reasons, this Court should deny the petition for a writ of certiorari.

I. THIS COURT'S JURISPRUDENCE CONCERNING THE REGULATION OF SEXUALLY ORIENTED BUSINESSES HAS NOT ENGENDERED SIGNIFICANT CONFUSION AMONG LOWER COURTS.

Jameson's primary argument supporting his petition for writ of certiorari is that "the highly-fractured nature of this Court's plurality opinions regarding the 'secondary effects' doctrine has led to significant confusion in the lower courts." App. 11. Although several of this Court's decisions in this area

of law are indeed plurality opinions, the resulting jurisprudence is clear and consistent.

In *United States v. O'Brien*, 391 U.S. 367 (1968), this Court set forth the standard for evaluating restrictions on expressive conduct under the First Amendment:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

The Court applied this standard in the adult business context in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). There, the Court considered a time, place, and manner regulation that required adult theaters to locate more than 1,000 feet from residential zones, dwellings, churches, parks, and schools. *Id.* at 46. The Court stated that "content-neutral" speech regulations—those that are justified without reference to the content of the regulated speech—"are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Id.* at 47-48.

With regard to whether the ordinance served a substantial governmental interest, the Court held that Renton was entitled to rely on the experiences of other cities and the findings summarized in judicial decisions about the secondary effects associated with sexually oriented businesses. *Id.* at 51-52. The Court stated the city was not required to rely on local studies, nor was it required to conduct new studies or to produce evidence independent from that produced by other cities. *Id.* Under *Renton*, a regulation satisfies the First Amendment "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.*

Five years later, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the Court applied *O'Brien* analysis to a state statute prohibiting public nudity when it was challenged on First Amendment grounds by establishments that desired to provide totally nude dancing. 501 U.S. at 567 (plurality opinion); *id.* at 582 (Souter, J., concurring). Despite the lack of *any* legislative history or record evidence concerning secondary effects, the nudity ban in *Barnes* was upheld because it served a current governmental interest in preventing the negative secondary effects associated with nude dancing. *Id.* at 582-83 (Souter, J., concurring).

Relying on *Renton*, the controlling opinion in *Barnes* concluded that live nude dancing would likely produce the same negative secondary effects as the type of entertainment at issue in previous Court decisions (*i.e.*, *Renton*, *American Mini Theatres*, *LaRue*), and that the statute therefore served a substantial government interest in preventing such

adverse effects. *Id.* at 584. The opinion agreed with "*Renton*'s recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects," and it held that regulating adult businesses due to their correlation with secondary effects is unrelated to the suppression of free expression. *Id.* at 584-86.

More recently, in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), this Court applied *O'Brien* analysis and the evidentiary standard set forth in *Renton* to conclude that a ban on public nudity, which required erotic dancers to wear pasties and g-strings, furthered the government interest in preventing harmful secondary effects and did not violate the First Amendment. The court approved the city's reliance on previous judicial decisions that described the evidentiary basis for similar regulations. *Id.* at 296-97. It also recognized that the city's own secondary effects findings—unaided by extrinsic evidence—are sufficient in the absence of specific reason to doubt them. *Id.* at 297-98. Finally, the Court rejected the idea that empirical analysis or academic studies are required for establishing a substantial government interest under *O'Brien*, holding that the government has a "freer hand" when regulating conduct. 529 U.S. at 299-300.

Finally, in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), the Court applied *Renton* analysis to a unique zoning regulation prohibiting the combination of adult bookstore and adult arcade operations under one roof. The city contended that such combinations would have the same zoning-type secondary effects as the city had found, in an earlier

study, to be associated with separate sexually oriented businesses clustered in a neighborhood. 535 U.S. at 430-31.

Los Angeles—which relied *solely* on its 1977 zoning study—admitted that it did not study the effects of "any separate-standing adult bookstore or arcade," let alone any "combination" establishments. *Id.* at 436. Although the lower courts granted summary judgment against the city for lack of specific evidence concerning "combination" businesses, this Court reversed, holding that the circuit court erred in "refus[ing] to allow the city to draw the inference that 'the expansion of an adult bookstore to include an adult arcade would increase' business activity and produce the harmful secondary effects" identified in the city's zoning study. *Id.* at 436-37 (quoting 222 F.3d 719, 726 (9th Cir. 2000)). The Court also explained that while a city must provide evidence supporting its own rationale, the city "does not bear the burden of providing evidence that rules out" alternative theories of secondary effects. *Alameda Books*, 535 U.S. at 437 ("The Court of Appeals simply replaced the city's theory . . . with its own . . . .").

Alameda Books clarifies that the latitude given cities to address secondary effects allows reliance on evidence of harm not directly on point with the regulation adopted, but nevertheless supportive of an inference justifying the regulation. It was in this context of relying on an inference that the plurality introduced a burden-shifting procedure—not to "appraise the wisdom of the City's decision," *Renton*, 475 U.S. at 52, but only to ensure that "the municipality meets the [reasonably believed to be

relevant] standard set forth in *Renton*." *Alameda Books*, 535 U.S. at 438-39.

Justice Kennedy's concurrence stressed that a city cannot advance a content-based rationale, *i.e.*, that the city will reduce secondary effects because its regulation will force the closure of one or more adult businesses. *Id.* at 450-51. Rather, a city must "advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." *Id.* at 449. This is the "proposition [that] a city need[s] to advance in order to sustain a secondary-effects ordinance." *Id.*

Justice Kennedy agreed with the plurality that the city's inference, drawn from its zoning study, was reasonable. *Id.* at 450-52. He emphasized that cities need only rely on some evidence "reasonably believed to be relevant" when reaching legislative judgments concerning secondary effects, acknowledging that city councils are in a better position than the courts to make policy decisions affecting their municipalities. *Id.*

The Kentucky Supreme Court faithfully applied these precedents in the opinion below when it ruled, as a matter of law, that the Ordinance served a substantial governmental interest. It properly evaluated all the evidence under the *Alameda Books* framework to ensure that the County relied on evidence "reasonably believed to be relevant" to the secondary effects the Ordinance seeks to address. Consistent with this Court's on-point decisions in *Barnes* and *City of Erie*, the Kentucky Supreme Court

held that the City's extensive legislative record and its rationale of preventing illicit sexual behavior and other secondary effects satisfied the *O'Brien / Renton* standard.

Conspicuously, Jameson does not argue that even one legal principle on which the Kentucky Supreme Court based its decision is contrary to or inconsistent with what Jameson insists is this Court's supposedly fractured and confusing jurisprudence. Jameson's arguments against the ruling below consist of alleged misapplication of a properly stated rule of law and are therefore an inappropriate basis for granting certiorari. *See* United States Supreme Court Rule 10.

Ignoring this fatal defect in his petition, Jameson contends that "a number of courts, including the Kentucky Supreme Court here, have recently devoted entire portions of their opinions just trying to decipher what these split decisions mean." App. 13 (citing cases). This conflates analysis with confusion. In each of the cited opinions, the various courts simply proceed, as required, to discern the holding of a plurality decision of this Court under *Marks v. United States*, 430 U.S. 188 (1977) (explaining that the holding of a plurality decision may be viewed as that position taken by those justices who concur in the judgment on the narrowest grounds.). In each of those cases, the courts perform the same analysis under *Marks* and arrive at the same conclusions as to which of this Court's opinions constitute the official holding of a plurality decision.

Notwithstanding Jameson's claim of confusion, lower courts have carefully followed this Court's

precedents and have reached consistent results regarding regulation of nude conduct in sexually oriented businesses. *See, e.g.*, *SOB, Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003) (rejecting adult business's challenge to nudity regulation); *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860 (11th Cir. 2007) (same). Because all the circuit courts concur with the Kentucky Supreme Court's findings as to this Court's holdings in plurality opinions, Jameson's claim of "significant confusion" on this point is demonstrably incorrect. The petition should be denied.

II. THE DECISION BELOW DOES NOT CONFLICT WITH GOVERNING PRECEDENT IN THE ELEVENTH CIRCUIT.

Jameson also argues that "the Kentucky Supreme Court's seeming rejection of the relevance of a lack of localized secondary effects" is in conflict with rulings of the Eleventh Circuit, especially *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003), which allegedly required "localized empirical studies." App. 17.

As an initial matter, to the extent that *Peek-A-Boo*, one of the first circuit court cases decided after *Alameda Books*, may be read to require a municipality to product local or empirical evidence of negative secondary effects, it is flatly contrary to this Court's precedent. "[L]egislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584 (Souter, J., concurring

in judgment) (following *Renton*, 475 U.S. 41, 51-52)). "All five Justices in the *Alameda Books* majority affirmed *Renton's* core principle that local governments are not required to conduct their own studies in order to justify an ordinance designed to combat the secondary effects of adult businesses. *See Alameda Books*, 535 U.S. at 438 (plurality opinion); *id.* at 451 (Kennedy, J., concurring)." *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1193 (9th Cir. 2004). Jameson cannot create a split of authority on the back of a circuit court opinion that is so obviously contrary to governing law.

Moreover, the Kentucky Supreme Court distinguished *Peek-A-Boo* and its substantially different factual record. App. 47. Here, Jameson offered no evidence that undermined the negative secondary effects evidence on which the County relied in crafting its Ordinance, nor did Jameson cast any doubt on the County's straightforward rationale that regulating nude conduct in erotic enterprises will further the interest in preventing illicit sex acts in such establishments.

Finally, the most recent decision from the Eleventh Circuit on this topic reconciles any apparent conflict that may have once stemmed from *Peek-A-Boo*. In *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860 (11th Cir. 2007), the district court had ruled after a bench trial that the city's evidence supporting its ordinance did not further the substantial government interest in reducing negative secondary effects associated with strip clubs. 490 F.3d at 862. On appeal, the Eleventh Circuit reversed, noting that, under *Alameda Books*, a city need not conduct new

studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 875 (citation omitted). The court flatly rejected the plaintiff's "claim that either *Alameda Books* or *Peek-A-Boo Lounge* raises the evidentiary bar or requires a city to justify its ordinances with empirical evidence or scientific studies." *Id.* at 880.

Thus, the Eleventh Circuit's position is consistent with that of the Kentucky Supreme Court as well as the other federal courts of appeal, and petition is not well-taken.

III. THE REMAINING POINTS OF LAW ON WHICH JAMESON CONTENDS A CIRCUIT SPLIT EXISTS DO NOT STEM FROM THE RULING BELOW.

Having failed to manufacture a circuit split from rulings the Kentucky Supreme Court *did* make in the case below, Jameson next attempts to manufacture one out of rulings it did *not* make. These efforts fail.

For example, Jameson maintains there is a circuit split on whether "the generally relied upon secondary effects reports examining adult bookstores and live entertainment venues can be used to justify regulations of 'take out' only facilities where there is no viewing of adult entertainment on the premises." App. 15. Here, of course, Jameson received a criminal citation for operating an "adult cabaret," which the Ordinance defines as regularly featuring nude or semi-nude persons in live performances or in films shown on

site. App. 3 n.5. Since Jameson does not operate such a "take out" establishment, this Court could not address any circuit split on that issue through this case.

Similarly, Jameson alleges "a conflict in the circuits concerning whether the secondary effects 'reliance' component of *Renton* can be used to legitimize the extension of regulations so that they apply to a business that presents 'adult' entertainment on only a *single* occasion." App. 15. Jameson's cabaret "regularly" features sexually explicit performances. App. 3 n.5. Therefore, the constitutionality of regulating a single performance is not at issue in this case.

Finally, Jameson alleges a significant split of authority on "when the government needs to rely on its secondary effects materials, and what secondary effects are relevant to a particular restriction upon expression." App. 23. Again, the preamble and findings of the Ordinance demonstrate that the Fiscal Court relied on its secondary effects rationale prior to the adoption of the Ordinance, App. 95-99, and thus the issue of post-enactment reliance was not addressed below. Therefore, this case is not the appropriate vehicle for this Court to address any such perceived differences of authority.

CONCLUSION

The decision below is faithful to this Court's on-point precedents. It presents no novel question of law warranting the granting of Jameson's petition for a writ of certiorari. There is no lower-court conflict

stemming from this case, and Jameson's identification of extraneous (alleged) conflicts does not make this case the proper vehicle for resolution of issues this case does not raise. For the foregoing reasons, the Commonwealth of Kentucky respectfully urges the Court to deny the petition.

Respectfully submitted,

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